



(2 Articles on Border Fence) Not Just a Green Concern & Why the security fence will never be built.

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Not Just a Green Concern

The federal government's response to a 2004 lawsuit to stop construction of the border fence has transformed an environmental fight into an all-out constitutional battle.

By Cory Briggs

Wednesday, Feb. 21, 2007 | There are many reasons why the public should oppose the construction of fences along the U.S.-Mexico border. Putting up such fences, including a three-layer fence along the border near San Diego, is bad policy.

Border fences don't work very well at keeping people out; anyone hell-bent on getting to the other side will dig tunnels underneath or simply walk around the fence. Border fences are aesthetically ugly, destroying desert and mountain views. And border fences are morally repulsive, statuary to xenophobia and inhumanity that cause death and other suffering.

But none of those reasons motivated recent litigation against the federal government to stop the remainder of the triple fence here in San Diego or the 37-mile fence planned for Yuma, Arizona. When activists first sued in 2004 to stop the triple fence, their reasons were entirely environmental: the fence's construction will cause the extinction of several endangered species and have profound impacts on the health of the Tijuana River Valley and its residents. The federal government's response to that lawsuit, however, has transformed an environmental fight into an all-out constitutional battle.

While the 2004 lawsuit was pending, Congress gave the secretary of homeland security the authority "to waive all legal requirements such secretary, in such secretary's sole discretion, determines necessary to ensure expeditious construction" of border fences. The secretary promptly waived the statute on which the lawsuit was based (and several other environment laws). On behalf of the activists, I argued that the authority was an unconstitutional delegation of the law-making obligation ascribed solely to Congress under Article I of the U.S.

Constitution (making the law entails un-making the law, according to the Supreme Court). Since the lawsuit was based solely on the National Environmental Policy Act, and because Congress had previously consented to the waiver of NEPA for the fence, the judge concluded that the secretary's waiver of NEPA was consistent with what Congress itself had done previously and thus did not offend the Constitution. Read the judge's decision [here](#).

Emboldened by that ruling, the Secretary of Homeland Security last month waived several environmental, historic-preservation, and military land-use laws for the 37-mile fence near Yuma. The problem with these waivers is that the secretary of homeland security gets to pick and choose which laws the federal government will and will not follow. You and I do not have the same luxury in our lives and for a very good reason: Nobody should be above the law.

Based on this fundamental principle of constitutional governance, [the new lawsuit](#) (filed last week) challenges the federal government's attempt to evade more than a dozen federal laws (other than NEPA and the Endangered Species Act) based on statutory cherry-picking by the secretary of homeland security.

If Congress believes that certain laws should not apply to the construction of border fences, then Congress should amend the laws accordingly. That's what the members of Congress get paid to do, and we hold them accountable for their actions at the ballot box. But they must not be allowed to delegate their law-making obligation to an unelected, unaccountable political appointee in the executive branch. (Significantly, not even the president -- the only elected official in the executive branch and the secretary of homeland security's boss -- has the authority to tell the secretary which laws to waive.)

Apart from offending the Constitution, letting the secretary of homeland security waive laws willy-nilly has the potential for other horrible consequences. What's to stop the secretary from waiving the laws requiring minimum wages for those who work on the fence, or the laws requiring employers to provide the safest possible work environment, or the laws requiring open, competitive bidding on government contracts, or the laws prohibiting dishonesty in government contracting, or even the laws protecting whistle-blowers who expose wrongdoing by government officials and contractors? The role of Congress is to balance all the competing interests and considerations and then decide what rules everyone must follow; that's what it means to make policy. The executive branch's job is to enforce the rules; that's what it means to be an executive. The separate-of-powers doctrine prohibits the one who enforces the law from making the law in the first place, thereby protecting citizens from tyranny.

So the fight over border fences is no longer merely about protecting the environment. It's now, first and foremost, about defending the Constitution from attack by our political leaders. No matter what one thinks about the wisdom of building fences along the border, our first obligation in protecting the American way of life -- even before protecting against outsiders -- must be protecting our centuries-old constitutional form of government from internal attacks. By giving unbridled waiver authority to the secretary of homeland security, Congress mounted an attack on all of us.

Cory Briggs is an environmental lawyer, who recently [filed a lawsuit](#) , for the second time, to stop construction of the border fence. Agree with him? Disagree? Send a letter to the editor [here](#).



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Dispatch From the Mexican Border **Why the security fence will never be built.**

By Eliza Barclay

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CABORCA, Mexico—Francisco is a young, brash marijuana "mule" from this Mexican town 95 miles from the border with Arizona. While a phalanx of Border Patrol agents, National Guardsmen, and the technological shield designed to deter and catch people like him waits on the other side, he doesn't seem at all intimidated. "Crossing the border is pretty easy," he told me. "You have to know where you're going, and you have to work with the right people, but you can make it."

It is the ease with which people like Francisco have slipped across the border that has inspired fiercer border-enforcement measures.

Ever since October 2006, when President George W. Bush signed a bill authorizing the construction of 700 miles of fencing along the border with Mexico, top-ranking Latin American politicians have denounced the plan, calling it unnecessary, offensive, and, in the words of former Mexican President Vicente Fox, "deplorable."

What few Latin Americans—or residents north of the border for that matter—seem to realize is that there is little chance this monster wall will ever be built, at least in its entirety.

"This was more of a piece of symbolism than a practical piece of legislation," says Doris Meissner, a senior fellow at the Migration Policy Institute and a former commissioner of what was then the U.S. Immigration and Naturalization Service. "The fencing element of border security has been exaggerated politically in terms of the expectations that politicians have set for it."

The bill, called the Secure Fence Act of 2006, called for a [double-layer fence](#) with stadium

lighting to be built along a third of the border, with sections in California, Arizona, New Mexico, and Texas. Many immigration experts say the proposal was a political ploy at a critical time before the midterm elections. In the new session of Congress, lawmakers may return to proposals for comprehensive immigration reform that could reduce the need for more physical barriers.

The exorbitant costs, the difficulty of appropriating funds, the construction challenges along rough patches of terrain, and local opposition to shorter sections of fence already under construction suggest that it will be almost impossible to construct such a massive barrier.

A handful of border cities including San Diego; El Paso, Texas; and Nogales, Ariz., already have some type of fencing—mostly composed of welded strips of corrugated steel—in place. These fences were built in the mid-1990s in U.S.-government operations designed to crack down on the busiest crossing points. These and other physical barriers helped to [redirect people away from urban points of entry into more remote areas](#), like the Arizona desert and south Texas. Although fewer people cross where there are currently barriers, studies show that overall inflows of immigrants have not slowed. According to estimates by the Pew Hispanic Center, between 700,000 and 850,000 illegal immigrants have entered the United States every year since 2000, bringing the [total unauthorized migrant population](#) to nearly 12 million.

Even though San Diego now has 9 miles of fence, the Department of Homeland Security has been struggling to extend the wall an additional 3-and-a-half miles through a zone called Smuggler's Gulch. Environmental groups in San Diego opposed the plan to fill in the uneven terrain to provide a more stable base for the fence and have gone to court to prevent it. Though DHS has the authority to waive any U.S. law—including environmental laws—in the name of homeland security, the process has been stalled, and the costs have steadily increased.

Cory Briggs, a lawyer who represented the Sierra Club and other groups in their attempt to sue DHS, said that he expects other environmental groups along the border to fight attempts to build more fencing if the federal government were to proceed. "I think that enviros learned a valuable lesson on the San Diego-Tijuana border fence and will therefore be much more active on the 700-mile fence," said Briggs.

DHS would also likely have to wrestle with local land owners, as well as the National Park and Forest Services, who manage many parcels of land adjacent to the border where new sections of fence could be built. "There are sure to be a lot of 'Not in my backyard' interests along the border, and the government will run up against permit issues with private landowners and tribal leaders," said Rey Koslowski, a professor of political science and public policy at the State University of New York at Albany.

Prohibitive costs may be another crucial factor. Already, homeland-security watchdogs like the DHS inspector general's office are grumbling about underestimates for the Secure Border Initiative Network (SBI*net*), a high-tech DHS plan to transform border control through technology and infrastructure. In September, DHS announced it was awarding the primary \$2.5 billion SBI*net* contract to Boeing. Boeing is building a string of 1,800 towers and associated sensors along the borders with Mexico and Canada. The towers will be equipped with cameras and motion and heat detectors linked to computers in the Border Patrol's control room and

mobile vehicle units. The initiative also calls for more Border Patrol agents. In November 2006, the inspector general's office said that *SBI*net could cost as much as \$30 billion, nearly 15 times the original estimate. (No firm estimate has ever been available for the cost of the 700-mile fence, but the San Diego portion alone has cost upward of \$74 million so far.)

But even as the plan to build the fence looks shaky, few disagree that increased enforcement could be part of an effective plan to deal with the chaotic situation at the border. The Border Patrol claims that recent advances in manpower and technology have discouraged would-be migrants from crossing illegally into the United States from Mexico—quantified by an 8.4 percent decrease in apprehensions between 2005 and 2006. And in the first four months of fiscal year 2007, arrests of illegal immigrants from along the southern border have dropped 27 percent compared to the same period in fiscal 2006. They have also seized more drugs: The agency grabbed 1.3 million pounds of marijuana in 2006, up 13 percent from 2005.

But the Border Patrol has acknowledged that "effective control" of the entire border remains far out of reach. The agency aims to control 345 miles by the end of 2007 and the whole thing in five years.

Some experts worry that new barriers would only encourage would-be crossers to find other ways to get across—for instance, by using forged documents or by hiding in vehicles and crossing at legal crossing points. "Barriers make it more difficult to cross, of course," said Koslowski. "But more barriers between the ports of entry will drive people through those ports; they will figure out more clandestine ways of hiding."

For Francisco, the smuggler, business will continue as usual, as long as there's good money to be made transporting people and drugs across the border. And as a friend of Francisco's commented, "*El desierto es todavía bien grande, gracias a Dios* ." The desert is still very big, thank God.

Eliza Barclay is a writer based in Mexico City. She contributes to Fortune, Wired News, and the Houston Chronicle.

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